SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

JAVAR WARD,

Plaintiff,

- against -

WC 28 REALTY LLC and PIZZAROTTI LLC,

Defendants.

- x

WC 28 REALTY LLC and PIZZAROTTI LLC,

Third-Party Plaintiffs,

- against -

COPPER SERVICES LLC,

Third-Party Defendant.

- x

Index No.: 713350/2018

Motion Date: 10/28/21

Motion No.: 41

Motion Seq.: 4

The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR § 3212, granting plaintiff partial summary judgment against defendants pursuant to Labor Law § 240(1):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memo. of Law....EF	66 - 76
Affirmation in Opposition-Exhibits.....EF	81 - 84
Reply Affirmation-Exhibit.....EF	85 - 87

This personal injury action arises out of an accident that occurred on August 14, 2018. The Complaint alleges that plaintiff was struck and injured by a falling 400-500 pound air-conditioning unit that was in the midst of being installed into a ceiling approximately fifteen feet overhead. At the time of the accident, WC 28 Realty LLC (WC) owned the premises. Pizzarotti LLC (Pizzarotti) was the construction manager. Pizzarotti retained Copper Services LLC (Copper), plaintiff's employer, for HVAC, Plumbing, and Sprinkler work.

Plaintiff commenced this action by filing a summons and complaint on August 29, 2018. Defendants joined issue by service of an answer on December 18, 2018. On February 13, 2019, defendants commenced a third-party action. Copper served an answer on April 12, 2019. Plaintiff now moves for summary judgment on his Labor Law § 240(1) claim.

At his examination before trial, plaintiff testified that he was an employee of Copper working on the subject project, installing sprinklers, carrying large pipes, helping carry tools and materials, and assisting plumbers. At approximately 8:45 a.m. on the date of the accident, he was assigned by his foreman, Alejandro Buffa, to go up and assist other Copper employees and see what they needed. He received all of his instructions from Buffa. When he reached the 13th floor, he found other Copper employees who had already finished installing heating vents. The workers needed to move their materials to a different location to begin work in another area. Before he could start moving the materials to a different location, an AC unit weighing 400-500 pounds fell from approximately fifteen feet, striking him in the right forearm, causing lacerations. While he was attempting to assist his co-workers in moving the tools and materials, other workers were in the midst of installing an AC unit overhead. To install the AC unit, it is elevated to an overhead position near the ceiling by means of a lift. One worker operates the lift while another worker is on a ladder. The worker on the ladder was adjusting the Kindorf brackets upon which the AC unit would ultimately rest. He observed the worker on the ladder adjusting the fourth bolt on the Kindorf brackets when the accident occurred, and the AC unit came falling down. The worker operating the lift removed the lift before the last bolt could be secured. Before the lift was removed, he told the operator of the lift that removing the lift prior to the Kindorf being secured is dangerous. After he warned the lift operator, within two to three or five minutes, he heard a noise, turned around to see where the rattling noise was coming from, and saw the AC unit coming straight at him. A co-worker, Alex, witnessed the accident and told him to watch out before the accident happened.

Domonique Paraison, the site safety manager for Pizzarotti at the time of the accident, testified that Pizzarotti is a construction management company that coordinates the trades on the job sites. His specific duties entailed ensuring safety compliance on the job site. There was no general contractor for the specific project. All subcontractors for the job were hired directly by Pizzarotti. Copper was retained by Pizzarotti to perform mechanical work for the project, which consisted of erecting two residential towers ten/eleven stories tall, bridged

together. He was present on the job site everyday and would walk the job site daily. He was made aware of the accident approximately two weeks after the accident when he received an email from the Vice President of Safety of Pizzarotti asking what he knew about the accident. He then spoke to plaintiff's foreman, Buffa. Buffa explained that two employees were lifting a fan coil unit system approximately two feet off the floor. While lifting the unit, it slipped, causing the laceration on plaintiff's arm. He did not speak with plaintiff or anyone else concerning the accident. He did not undertake an investigation. He did not witness the incident. He did not speak to anyone who witnessed the accident.

Leo Andreadakis, the superintendent and project manager for Copper at the time of the accident, testified that Copper was hired by Pizzarotti to perform mechanical services. He was unaware of any witnesses to the accident. Any knowledge he has of the accident was received via the foreman, Buffa. He testified that just the one Kindorf support fell, not the entire AC unit. To install an AC unit, the AC unit is raised by means of a mechanical lift that holds up the unit and supports it while the Kindorf brackets are installed to secure it.

Alejandro Buffa, plaintiff's foreman, testified that plaintiff received all of his instructions from him. Plaintiff was considered a junior mechanic who helped the mechanics. Plaintiff came down to the first floor with a cut on his forearm, and told him that a machine fell and hit him in the arm. Sometime later, he went to the floor where the accident occurred, and discovered that all the machines had already been brought down. He was told that the machine was not properly held and that is why it fell. He saw the machine on the floor, but did not notice whether it was broken.

The proponent of a summary judgment motion has the initial burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to

protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (see Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]).

Here, plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). Plaintiff submitted evidence demonstrating that he was caused to sustain injuries when the AC unit, which was being hoisted and secured, fell because of the absence or inadequacy of a safety device of the kind enumerated in Labor Law § 240(1) (see Narducci v Manhasset Bay Assoc., 96 NY2d 259 [2001]; Gabrus v New York City Hous. Auth., 105 AD3d 699 [2d Dept. 2013]).

In opposition, defendants submit copies of plaintiff's medical records. On the date of the accident at Northwell Health - Lenox Hill Hospital, plaintiff indicated that he got hit accidentally with a pipe at his plumbing job. On August 28, 2018, plaintiff stated to Dr. Oleg Olshanetsky that he was standing by the side of his co-worker, who was on the ladder trying to adjust an oversized AC unit under the ceiling, he was supporting a heavy unit by letting it sit over his shoulder, but the unit slipped down from under the ceiling and struck his right arm, causing him to fall and land on the right side of his body. Defendants also submit a copy of plaintiff's Worker's Compensation Employee Claim Form, which is singed by plaintiff. The Form indicates that plaintiff was assisting a co-worker while his co-worker was finishing up an installation unit.

Defendants contend that the motion must be denied because there are questions of fact as to the proximate cause of plaintiff's accident and as plaintiff made contradictory statements to his treating physicians and at his deposition.

The statements contained in the hospital records that plaintiff was hit by a pipe rather than an AC unit is not germane to treatment or diagnosis, and thus, the statement is inadmissible hearsay (see Gomez v Kitchen & Bath by Linda Burkhardt, Inc., 170 AD3d 967 [2d Dept. 2019]; Stock v Otis El. Co., 52 AD3d 816 [2d Dept. 2008]; Rivera v City of New York, 293 AD2d 383 [1st Dept. 2002][finding that statement contained in plaintiff's hospital records that plaintiff was hit by a rock is not admissible absent evidence establishing that the statement

was germane to treatment or diagnosis]).

Likewise, the deposition testimony of Paraison, Andreadakis, and Buffa, relied upon by defendants in opposition to the motion, revealed that none of these witnesses had personal knowledge of how the accident happened. Thus, any contradictory account as to how the accident occurred was based upon inadmissible hearsay and is of no probative value (see Guanopatin v Flushing Acquisition Holdings, LLC, 127 AD3d 812 [2d Dept. 2015][finding that the foreman's account as to how the accident occurred constituted hearsay since the foreman did not witness the accident]; Madalinski v Structure-Tone, Inc., 47 AD3d 687 [2d Dept. 2008]).

Lastly, the mere discrepancies in plaintiff's account of how the accident occurred are irrelevant since there is no dispute that plaintiff's injuries were caused by a falling AC unit (see Orellano v 29 E. 37th St. Realty Corp., 292 AD2d 289 [1st Dept. 2002]).

Accordingly, for the reasons stated above, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim is granted.

Dated: Long Island City, NY
October 28, 2021

FILED
10/29/2021
COUNTY CLERK
QUEENS COUNTY

Robert J. McDonald

ROBERT J. McDONALD
J.S.C.